No. 15599

In the
United States Court of Appeals
For the Ninth Circuit

ELMER F. SHEPARD and KATHRYN M. SHEPARD, his wife,
Appellants,

vs.

CAL-NINE FARMS, a corporation,
Appellee.

Brief of Appellee

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STATEMENT OF JURISDICTION

Appellee, plaintiff below, alleged in its complaint that it was a California corporation and a citizen of California, and that appellants, defendants below, were citizens and residents of Arizona. It also alleged that the amount in controversy in the case exceeded $3,000.00 exclusive of interest and costs. (Tr. 3). These allegations were admitted by the answer of appellants. (Tr. 8). The District Court, in its Finding of Fact No. 1, found in accord with each of these allegations. (Tr. 33). The District Court had jurisdiction of the case under 28 U.S.C. 1332, and this Court has jurisdiction to review the judgment of the District Court under 28 U.S.C. 1291.

APPELLEE'S STATEMENT OF THE CASE

Appellee by its complaint sought to recover damages from appellants for fraudulent misrepresentations concerning a well on a ranch bought from appellants by appellee. Trial to the court resulted in a judgment for appellee in the amount of $35,106.40. It is this judgment which appellants seek to reverse on this appeal.

Appellee is a California corporation whose organization under the laws of that state was completed on January 7, 1955. Prior to the organization of appellee, one Ernest Otto, a California farmer, had come to Arizona in October, 1954, for the purpose of picking cotton with his machine. He helped to pick cotton for several ranchers in the Harquahala Valley of Arizona, which runs north and west from the little town of Buckeye, Arizona. Buckeye is located about 30 miles west of Phoenix. He was told by these ranchers that defendant-appellant ELMER SHEPARD, hereafter called Shepard, wished to sell the ranch he owned in the Valley. Shortly after receiving this information, Otto talked to Shepard and was quoted a price of $80,000.00 on the Shepard ranch. (Tr. 86-87).

Not having enough money to finance such a deal himself, Otto returned to California and consulted his brother-in-law, Henry Haas. With the help of his brother-in-law, seven other people in the Fresno area were interested in putting up some money for the purchase of the Shepard ranch if the ranch met with Otto's

approval. (Tr. 95; 129). They consulted a lawyer in Fresno, and were told that the best way to handle such a transaction was to incorporate.

In the middle of November, 1954, Haas and Otto returned to Arizona to further investigate the Shepard property. They had with them at this time $2,000.00 in earnest money, put up on a pro-rata basis by the nine incorporators, if they decided to buy the property. (Tr. 129-30). On November 17, Haas and Otto went to the Shepard ranch for the purpose of looking it over and making inquiries. They met Elmer Shepard on the ranch, and there the conversations took place upon which this lawsuit is based. (Tr. 87-92).

Otto asked Shepard specifically what the output of the well was (Tr. 88), whether Shepard had ever had any trouble with the well (Tr. 90), and in addition commented adversely on the dirty appearance of the water which came out when Shepard turned on the well to demonstrate it. (Tr. 89). In response to these inquiries and comments Shepard stated that he thought the well was throwing 2200 gallons (Tr. 88), that he had had a little trouble which "you really couldn't class as trouble" (Tr. 90), and further stated that the dirty water coming out of the well was characteristic of the region when the pump was started (Tr. 89). Shepard also affirmatively stated that the well was in good condition. (Tr. 89).

Otto had farmed cotton for about five years, but his experience had been in the Fresno area of California. The wells there were shallow, and a set of bowls

on a pump would last from ten to fifteen years (Tr. 84). Otto had had no experience with the deep water wells used in the Harquahala Valley, and Haas had had no experience whatsoever with farming. Otto had made inquiry generally of several of the surrounding ranchers as to the Shepard property, but got answers which, though not unfavorable, were vague; in the words of Haas, he felt he "couldn't get to the bottom of it." (Tr. 277). Otto testified that to go further than a mere visual inspection of the discharge pipe of the well, and actually pull the pump, would cost around $1,500.00. (Tr. 158).

At the same time, Shepard represented to Otto that the well would "run" seventy to seventy-five two-inch siphon tubes. (Tr. 91). As appears from the colloquy between the Court and Otto, the siphon tubes are pipes that are laid over a ditch bank to take water out of the irrigation ditch and into the actual furrows where the cotton is planted. (Tr. 91).

Following a further conversation at a Buckeye motel that evening, an option agreement, Exhibit A to defendant's answer (Tr. 9), was executed between Shepard and Otto and Haas on November 17, 1954. Shepard knew at the time of the execution of this agreement that Otto and Haas were contemplating the formation of a corporation, and he had no objection to a corporation taking up the option so long as he got his money. (Tr. 74). On January 11, 1955, escrow instructions to the Phoenix Title & Trust Company embodying the option agreement were executed, show-

ing E. F. Shepard and Kathryn M. Shepard, his wife, as Sellers, and Cal-Nine Farms, a California corporation, as Buyer. (Exhibit B to defendant's answer, inserted in transcript). Two thousand dollars had been paid at the time of the execution of the option, and an additional $18,000.00 was paid upon the execution of the escrow instructions.

Otto, as President of Cal-Nine Farms, went into possession of the land in March, 1955. Shortly afterward, he commenced pre-irrigating the land preparatory to planting a cotton crop. (Tr. 98). At this time he set out some seventy two-inch pipes, but when the pump was turned on he was able to get only fifty-five of the pipes to run. (Tr. 99). When he discovered this, he made a closer examination of the discharge pipe. This pipe had a turned down spout, or "bonnet" on it, which made it rather difficult to examine; but by climbing into the weir box, stooping down, and looking up into the pipe, Otto discovered that there was a flange (a triangular piece of metal) welded into the pipe. (Tr. 99-100). There was considerable conflicting testimony about this flange; putting aside the purpose for which it was inserted in the pipe, Otto testified that it caused the discharge pipe to appear to be putting out considerably more water than it was. Based on this fact, and on the number of tubes which the well would run, Otto estimated the amount of water being put out by the well at the time he took over the land as being between 1300 and 1400 gallons per minute, although the output stream looked just as it had the previous November. This was in contrast to Shep-

ard's estimate of 2200 gallons as of November, 1954; it was also in contrast to Otto's earlier estimate of 2000 gallons, which had been made without benefit of attempting to run the tubes or the knowledge of the flange welded in the pipe. (Tr. 101). The only testimony on the question of the ordinary behavior of the output of the well between the end of the growing season, such as November, and the commencement of the new growing season, such as March, was by plaintiff's expert witness BROWN; he testified that a normal well would be at least as good in March as it had been the previous November, and probably somewhat better because of the tendency of standing water to rise in a well which is not being pumped. (Tr. 238).

Although the output of the well when Otto took over in March was substantially below what it had been represented to be, Otto still felt that if the output remained constant the well would supply him with enough water to irrigate his contemplated cotton crop. (Tr. 101-102). However, the output of the well declined steadily from its March capacity of between 1300 and 1400 gallons, and by July Otto was concerned lest the well fail entirely and he lose his cotton crop. At that time, he called in Gordon Cameron, a resident of Buckeye, a longtime friend of Elmer Shepard, and an experienced well driller who had done such work in California, Colorado, and Arizona. Cameron came out to the property, discussed the matter with Otto, and advised him never to turn the well off for the remainder of the growing season. Acting on this ad-

vice, Otto continued to keep the well on until September, even though by that time its capacity had declined to 250 gallons per minute and his cotton crop was suffering badly for lack of water. At that time, he turned off the well for good, feeling that further water at that stage for his already water-stressed cotton crop might do more damage than good. (Tr. 102-104; 197-198). The possibility of such damage was corroborated by the testimony of plaintiff's expert witness, JAMES R. CARTER, who was employed by the University of Arizona as an Assistant County Agricultural Agent. (Tr. 288).

In October, 1955, Otto again consulted Cameron as to what should be done with the well. Cameron at this time stated that the well was in such condition that it would not be feasible or advisable to attempt to repair it, and that the best course would be to simply drill a new well. (Tr. 226). Acting on this advice, Otto employed Cameron and did drill a new well a short distance away from the one which failed, and this well to date has proved to be a very successful one. (Tr. 199). The bowls on the pump were replaced with new bowls, since they had completely sanded up, but such of the pump machinery in the old well as could still be used was transferred to the new well. (Tr. 109). Cameron testified that everything done with respect to drilling the new well was necessary to obtain a good well. (Tr. 199).

The detailed testimony regarding the falsity of Shepard's representation and Shepard's knowledge

of that falsity will be treated in the appropriate section under the argument. For the purpose of this statement of the case, it will suffice to paraphrase the Court's findings of fact on this point: At the time that Shepard represented in November that the well would put out 2200 gallons per minute, it was incapable of pumping more than 1500 gallons per minute. The pump had actually been pulled four times in less than two years, and Shepard has spent over $12,000.00 in an effort to salvage what the man who drilled it (Cameron) described on the stand as a bad well from the day it was drilled. The casing in the well was broken or collapsed at a point somewhere between 400 feet and 500 feet down. Shephard knew of the falsity of each of these representations. (Finding IX, Tr. 36).

Otto, on behalf of appellee, expended the sum of $22,606.40 in drilling and equipping a new well which was the equivalent of what the other well had been represented to be. (Tr. 38; plaintiff's exhibits 3 through 5). In addition, Otto, farming on behalf of appellee, realized a yield from his cotton crop of only 116 bales for 105 acres planted. This was in contrast to his neighbor Cameron's yield of two and one-half bales to the acre (which would have given appellee 265 bales), and to even Shepard's yield the prior year of 1.7 bales to the acre (which would have given appellee 178 bales). The trial court found that this crop damage directly resulted from the lack of water which in turn resulted from the failure of the well. He found the amount of this loss to be $12,500.00. (Tr.

38-39). Following a trial to the Court in May, 1956, that Court on November 23, 1956, ordered that judgment be entered for the plaintiff in the sum of $35,-106.40, and specifying that of this amount $22,606.40 was for the cost of a new well and the balance, $12,-500.00, was for crop damage. (Tr. 28). On January 10, 1957, plaintiff's proposed findings of fact and conclusions of law were approved and adopted as the findings of fact and conclusions of law herein, (Tr. 33), and on the same date judgment in the amount of $35,106.40 was entered in the docket of the District Court. (Tr. 40). Defendants' motion for a new trial was denied on March 1, 1957 (Tr. 49), and defendants filed their notice of appeal to this Court on March 22, 1957. (Tr. 49).

SUMMARY OF ARGUMENT

1. Plaintiff-appellee was the proper party to bring this action seeking to recover for defendant Shepard's fraudulent representation. (In Answer to Appellants' points 1 through 5, "Summary of Argument", Appellants' brief, page 17).

2. Plaintiff-appellee proved at the trial by clear and convincing evidence each of the nine necessary elements for a cause of action in fraud, and appellants' contentions in their brief to the contrary are simply a rehash of conflicting evidence with emphasis upon the testimony of appellants' witnesses which the trial court was in no respect required to believe. (In Answer to Appellants' points 6 and 7, "Summary of Argument", Appellants' brief, page 17).

3. The trial court applied the correct measure of damages, after having determined the existence of liability, and there is ample testimony to support the damages which it awarded. (In Answer to Appellants' point 8, "Summary of Argument", Appellants' brief, page 18).

4. The trial court was required to, and did, follow Arizona Substantive Law in deciding this case. (Point 9, "Summary of Argument", Appellants' brief, page 18).

1. Plaintiff's Standing to Sue for Fraud.

Appellants' argument under this head (Defendants' brief, pages 19-30) appears to be that since the fraudulent representations were made to Otto and Haas before the appellee Cal-Nine Farms, was incorporated, the latter cannot bring any action against Shepard for these fraudulent representations. Appellants apparently maintain that even the assignment from Otto and Haas to the corporation (plaintiff's Exhibit 8; Finding XVIII, Tr. 39), which specifically included the assignor's right to sue for fraud, does not transfer the right of action to the corporation, since a cause of action for fraud is not assignable.

Before discussing the authorities on this point, appellee desires to point out to the Court that if the corporation may not sue for fraud under these circumstances, quite clearly no one can. It was the corporation's money that was expended in reliance on the representation, and the corporation's property which was damaged as a result of the fraud. If appellants are correct, the individuals may not sue because they have not been damaged, and the corporation may not sue because the fraudulent representations were not made at a time when it was in existence.

The result of such a remarkable hiatus in the law would be an open season for the perpetrators of fraud at the expense of potential incorporators.

The Supreme Court of Arizona has never had occasion to pass on the point raised by appellants, but

the Supreme Court of California has done so in a case which squarely sustains the right of appellee to bring this action, even without an assignment.

In *Crystal Pier Amusement Company vs. Cannan,* 219 Cal. 184, 25 P. 2d 839, the Supreme Court of California held that a corporation *could* recover damages for fraud perpetrated upon its incorporators, prior to the existence of the corporation. There the officers of an existing corporation dealt with a contractor and employed him to erect an amusement pier. While the work was in progress, these same officers incorporated another corporation to hold title to the pier, and to construct a ballroom which was part of the same project. After the construction of the ballroom, the second corporation brought an action for fraud against the contractor based on representations made to the first corporation prior to the organization of the second corporation. The contention of the defendannts, as summarized in the opinion of the Court, was that the second corporation had no cause of action because the representations were not made to it, and the first corporation had no cause of action because it did not build the ballroom. In rejecting such a contention, the Supreme Court of California stated:

> "It would indeed be remarkable if the law proved so barren that legal principle could not be found to avoid such a result."

25 P. 2d at 840.

The Court stated further that:

> "It is, of course, obvious that the whole matter would have been settled by an express assignment

of the cause of action for fraud by the amusement company to the holding company. . . . "

25 P. 2d at 840.

It went on to say that even without an assignment, the second corporation could maintain an action for fraud. It based its conclusion on the theory that in order for representations to be actionable, it is not necessary that they be made directly to the party seeking recovery. The Court said:

"A representation made to one person with the intention that it shall reach the ears of another, and be acted upon by him, and which does reach him, and is acted upon by him to his injury, gives the person so acting upon it the same right to relief or redress as if it had been made to him directly." (Citing cases).

25 P. 2d at 841.

The California Court cited two older cases from other jurisdictions, both of which are likewise square authority for recovery in the instant case. In *Iowa Economic Heater Company vs. American Economic Heater Company,* 32 Fed. 735, certain individuals had organized the plaintiff corporation in reliance upon representations by the defendant. The Court allowed the corporation to maintain action for fraud, overruling the contention that it had no standing because it was not in existence at the time the representations were made, saying:

"A corporation cannot be said to know anything except through its members or agents, and representations made to individuals, by reason of which such individuals are induced to form a corporation, may be said to be made to the corporation. The statements made were the moving cause of the organization of the corporation, and it was formed to act upon the information given to those who promoted its organization; and if this information was false and fraudulent, and the corporation was damaged thereby, it may have its action for such resulting damages."

32 Fed. at 736.

In *Scholfield Gear and Pulley Company vs. Scholfield,* 71 Conn. 1, 40 Atl. 1046, the Court made the following statement in dealing with a similar factual situation:

"If, therefore, the defendant fraudulently told the five individuals named in the complaint what is there alleged, in order to induce them to form the plaintiff corporation, and procure the execution by it of the contract which was the subject of their negotiation with him, and if, thereupon, in reliance on his statements, they did the very things which his representations were designed to promote or secure, the fact that the last step—the execution of the contract—was, in form, the act of a party with which he never had any direct communication, cannot relieve him from responsibility for all the damages naturally resulting from his fraud. . . . . It would have been an idle ceremony for these five men, after becoming the sole

> shareholders and directors of the plaintiff, to recount to themselves, as such, the representations made to them as individuals, a few weeks before, in contemplation of their occupying this very position. Whatever had been thus said to them to influence the action of the projected corporation was, in legal effect, known to the corporation as soon as it was formed. . . . "
>
> 40 Atl. at 1049.

The authorities just cited show that even without an assignment, appellee could maintain this action; and the *Crystal Pier* case states that had their been an assignment in that case, "it is obvious that the whole matter would have been settled". Here there was an assignment from Otto and Haas to appellee (plaintiff'se Exhibit 8), and appellee's right to maintain the action is clear.

One might think, to read the section of appellants' brief devoted to this argument, that the cases there cited represent holdings contrary to the state and federal cases cited above. However, upon examination of these cases, it is apparent that not one of them deals with the precise question decided by the California, Connecticut, and Federal cases cited above. Instead, without exception, they deal with two entirely different questions: (a) Does an assignment or a transfer of a piece of property which does not specifically assign also a cause of action for fraud in connection with the property nevertheless pass with it by implication that cause of action? and (b) Is a cause of action for

fraud assignable to a third person who is a stranger to the transaction involving the fraud?

The very language quoted by appellant from the Arizona case of *Schwartz vs. Durham,* 52 Ariz. 256, 80 P. 2d 453, 456, upon which appellant so heavily relies, shows that it is dealing with the question of who, as between the transferor and transferee, may sue for fraud *when there is a contest as to this matter between the transferor and the transferee.* Both of the quotations from *Schwartz vs. Durham* on pages 19 and 20 make it clear that the thing the Supreme Court of Arizona was there deciding was whether or not the transfer of stock had carried with it the right of action by implication, or whether it did not pass with a general assignment of the property. No fair reading of *Schwartz vs. Durham* can extract more than that from it, and no serious contention can be made that such a rule in any way militates against the standing of plaintiff here. For here, as is apparent from the language of plaintiffs' Exhibit 8, the right to sue for fraud was expressly included in the assignment from Otto and Haas to appellee.

Appellants also argue against the effect of the assignment in this case on the grounds that Arizona law does not permit the assignment of a cause of action for fraud. (Appellants' brief, pages 23-27). Appellee first desires to point out that there are two major distinctions between the rule contended for by appellants and the facts of the instant case, and then to further point out that even the rule contended for by appel-

lants is totally unsupported in the cases decided by the Supreme Court of Arizona.

In the first place, if this Court believes that the correct rule, and the rule that would be followed by the Supreme Court of Arizona if that question were presented, is that laid down in the *Crystal Pier, Economic Heater,* and *Scholfield* cases, *supra,* then the question of assignment need never be reached. Each of those cases permitted the corporation to sue for fraud perpetrated upon its officers prior to the existence of the corporation, *without any assignment at all.* In the second place, appellants' statement of the rule against assignment of a cause of action for fraud is an abstract statement of such rule, which presumably deals with an assignment to a stranger to the transaction. No case is cited where the Court has refused to permit operation of an assignment in the circumstances of this case, where if the corporation is not permitted to sue for fraud, the perpetrator of the fraud will go scot-free.

But putting aside for a moment these important distinctions, even the Arizona cases upon which appellants rely, to support their general rule against assignment, suggest an opposite conclusion under the present circumstances. In *Deatsch vs. Fairfield,* 27 Ariz. 387, 233 P. 887, 891, the Supreme Court of Arizona stated the general proposition that the test of the assignability of a chose in action is whether it will survive and pass to the personal representative. In the later case of *United Verde Extension Mining Com-*

pany vs. Ralston, 37 Ariz. 554, 296 P. 262, the Supreme Court of Arizona had occasion to consider whether a tort action for damage to property (as opposed to personal injury) would survive. The Court there said, quoting from an earlier case decided by this Court:

> "The Circuit Court of Appeals for the Ninth Circuit had before this identical question in *United Verde Copper Company vs. Jordan,* 14 F. 2nd 299, 301, and in disposing of it used the following language which is a correct statement of the law:
>
> 'The next inquiry is whether plaintiffs, as assignees, could recover under the counts alleging damages to the properties of others. We think they could. In *Deatsch vs. Fairfield,* 27 Ariz. 387, 233 P. 887, 38 A.L.R. 651, the Court said that the question of survivorship of a chose in action is the test of assignability. Under paragraph 398, Ariz. Civil Code, suits for recovery of damages or for any injury or damage done to land may be instituted by executors, administrators, or guardians in like manner as they could have been by their testators or intestates. Paragraph 968, page 447, Arizona Civil Code, provides that executors or administrators may maintain action for trespass committed on real estate of the decedent in his lifetime. Our opinion is that by the statutes of the state a cause of action which arises from a tort to real property or injuries to a decedent's estate, by which the value of the estate is lessened, survives, and that the general rule that such cause of action is capable of assignment obtains. (Citing Authority.)' "

296 P. at 264.

The later Arizona case of *Employers Casualty Company vs. Moore,* 60 Ariz. 544, 142 P. 2nd 414, held that in this state an action for personal injury was not assignable. As suggested by the language of that case, "Rights of action for torts causing injuries which are strictly personal and which do not survive are not capable of being assigned". 142 P. 2nd at 415. The Court was there dealing with the type of action which the law had been most reluctant to permit to be assigned: a cause of action for purely personal injuries. The Arizona Court and this Court had both in previous cases held that a tort action for damage in property *did* survive and *was assignable.* None of these cases specifically involved an action for fraud, but certainly the cause of action in the instant case was one for damage to property, rather than personal injury, and should be governed by the *United Verde* rule rather than the *Employers Casualty* rule. Finally, it is clear under the law in force by statute in Arizona today that the cause of action for fraud would survive and be assignable. Section 14-477, A.R.S., which went into effect in 1955, provides as follows:

> "Every cause of action, except a cause of action for damages for breach of promise to marry, seduction, libel, slander, separate maintenance, alimony, loss of consortium, or invasion of the right of privacy, shall survive the death of the person entitled thereto or liable therefore . . ."

Though this statute was procedural, and would not retroactively revive a cause of action which had

abated prior to its passage, *Rodriquez vs. Terry,* 79 Ariz. 348, 290 P. 2nd 248, it certainly would permit assignment of the cause of action for fraud after its effective date. Plaintiffs' Exhibit 8, the assignment from Haas and Otto to appellee, has the effect of both ratifying prior assignments and presently assigning; at least as to the latter, which would be as of the date of May 17, 1956, the cause of action for fraud was assignable at the time it was done under the present Arizona law.

It need not be assumed that the Supreme Court of Arizona would not have reached the same result required by the 1955 statute in the absence of such an enactment. As pointed out in the above discussion of Arizona cases, the Supreme Court of Arizona has never passed on the specific question of whether a cause of action for fraud is assignable. Certainly the Arizona Court would give some weight to the statement in 76 A.L.R. 403, 408, written 25 years ago:

> "The trend of decision under American statutes favors the survival of action and the causes of action *ex delicto* for fraud and deceit inducing the sale or purchase of property."

In that annotation in support of the statement just quoted are cited cases from California, Illinois, Massachusetts, Minnesota, Missouri, New Jersey, New York, North Carolina, Oregon, Rhode Island, West Virginia and Wisconsin.

In summary, appellants' argument as to standing fails for each of the following reasons:

(a) On authority, appellants' brief wholly disregards the *Crystal Pier, Ecanomic Heater* and *Scholfield* cases which are squarely in point here, and against which there appears to be no countervailing authority. These cases hold that a corporation which suffers damage as a result of fraudulent representations made to its officers prior to the existence of the corporation may maintain an action for fraud against the perpetrator of the fraudulent misrepresentations. These cases were cited by appellee in its trial brief in the District Court, and in its opening brief to that Court following the trial of the case, and appellants' complete disregard of them can mean only that appellants cannot answer or distinguish their holding. The cases cited by appellant on this point, the leading one of which appears to be *Schwartz vs. Durham, supra,* deal with an entirely separate question: when there has been an assignment of property, without the assignment specifically mentioning any right to sue for fraud, and when a contest arises as to that right between the assignor and the assignee, who is the proper party to bring the action?

(b) On authority, the Supreme Court of Arizona has held that assignability of a cause of action depends upon whether or not the cause of action will survive. It has gone on to hold that a tort action for damages to property will survive, whereas a cause of action for personal injuries will not survive. Clearly, the instant fraud action is closer to an action in tort for damages to property than it is to a cause of action

for personal injury. Under statutory law in effect in Arizona on the date that plaintiffs' Exhibit 8, the assignment from Otto and Haas to Cal-Nine Farms, was executed, a cause of action for fraud is clearly assignable.

(c) On principle, the harsh and irrational rule contended for by appellants might, with its perverse logic, have appeal to the Medes and the Persians, but it ought not to commend itself to any Court in this day and age. Neatly bifurcating the cause of action so that the defrauded party was not damaged, and the damaged party was not defrauded, the rule would confer a previously unknown and presently unjustified immunity upon the perpetrators of fraud, without correspondingly benefiting any interests deserving of protection by the Courts.

Sufficiency of Evidence to Support the Findings of the Trial Court.

Appellants cite in their brief Arizona cases setting forth the nine elements which the Supreme Court of Arizona has held that a plaintiff must prove in order to sustain a cause of action for fraud. (Appellants' brief, page 31). Appellee accepts this statement of the Arizona law as being accurate, and respectfully refers this Court to a more recent case than those cited by appellants which appears to be the latest pronouncement of the Arizona Court on the subject. *Wilson vs. Byrd,* 79 Ariz. 302, 288 P. 2nd 1079, 1081. Appellants apparently do not challenge the sufficiency

of the findings to support the judgment, but they do, in their extensive specifications of error and in their argument (Appellants' brief, pages 31-59), deny that appellee sustained its burden of proof on any one of these nine elements. In order that this argument may be responsive to that of appellants', appellee will discuss each of these nine elements in order.

Before dealing with testimony on specific issues, however, appellee wishes to briefly state the background in which this trial took place. Elmer Shepard, the defendant, was thirty-seven (37) years of age and had lived in Buckeye his entire life. (Tr. 159). He had been a farmer in the area for thirteen or fourteen years, (Tr. 159) and his father also farmed land in the area. (Tr. 74). When Shepard first purchased the land here in question in 1952, he was a pioneer in the Harquahala Valley, along with a few others: GORDON CAMERON, ED SWINDLE, RAYMOND BENSON, JIMMY HARRISON, and a couple of other farmers. (Tr. 185-186). Shepard had known Cameron ever since Cameron had come to Arizona, probably seven or eight or nine years (Tr. 186), and JULES TURNER, another Buckeye resident, had actually given an estimate of the output of Shepard's well. (Tr. 164). These settlers saw a great deal of each other while they were farming in the newly developed valley. (Tr. 185). Shepard was a good friend of all of them, by his own testimony (Tr. 186). All of them still resided in the Buckeye area at the time of the trial. (Tr. 186).

Otto, on the other hand, was a complete newcomer from California, having conducted his negotiations for the purchase of the land in a strange state, and taking up residence in Buckeye only in March, 1955. Haas, another shareholder in appellee, was never a resident of Arizona, and simply made occasional visits to the state from his home in Fresno, California.

In these circumstances, where the issue of the condition of the well on the Shepard property was being tried in Phoenix, thirty miles from Buckeye, it is more than passing strange that of all these people who were good friends of Shepard's, who were neighboring farmers undoubtedly acquainted with the condition of his well, and who were still residents of the Buckeye area, the only one of them called was Gordon Cameron —and he was called, not by Shepard, but by appellee. Shepard's witnesses, with one or two exceptions, claimed no intimate knowledge of the history of the well at all; they were either workers on Shepard's ranch, or sidekicks of Shepard's over a period of years (such as Ernest Wood). With such a background of Shepard's residence in the community for many years, in contrast with the recent arrival of Otto, the Trial Court was entitled to heavily weigh against defendant Shepard his failure to call these presumably responsible witnesses who would be acquainted with the condition of his well at the time in question.

A. Representation.

Shepard admitted that he told Otto: (i) that he thought the well was putting out 2200 gallons per minute; (ii) that the well would run 70 two inch tubes (Tr. 165). Otto testified that in addition Shepard represented that the well was in good condition (Tr. 89), that although Shepard said he had had a little trouble, "you really couldn't class it as trouble"; "the pump people told him the engine was not tuning up right, and the engine people told him there was something wrong with his pump, so he ended up by pulling the pump out of the hole, and found out everything was in good condition." (Tr. 90).

On the question of whether the representation as to good condition was ever made, it is interesting to note the contrast between Shepard's testimony in his deposition, taken over three months before trial, and his testimony at the trial:

Deposition:

(Tr. 73)

Q. Did you tell Mr. Otto and Mr. Haas that the well was in good condition?

A. (By Mr. Shepard) No, that was never brought up.

Trial:

(Tr. 165)

Q. And did you regard it as being in good condition at that time?

A: (By Mr. Shepard) Yes.

Q. Did you tell Mr. Otto and Mr. Haas it was?

A. They asked what condition it was, and I told them exactly what I'm telling you. . . .

The Trial Court was entitled to believe, and did believe (Finding IV, Tr. 34), that Shepard made each of these statements. The representation as to condition was certainly one of fact, and the fact that each of the other representations may have contained an element of opinion does not bar them from being representations.

Appellant cites not one case for his categorical statement (page 38 of his brief) that the lengthy conversation referred to between the parties could not be construed as anything more than the expression of an opinion. The law, both in Arizona and elsewhere, is to the contrary. The Supreme Court of Arizona in *Standard Insurance Agency vs. Northeast Rapid Transit Company,* 40 Ariz. 408, 12 P. 2nd 777, 780, approved the following statement from 6 Fletcher, Cyclopedia Corporation, paragraph 3868:

> "As to the false representations of the value of the stock, it may be said that, as a general rule, statements as to the present or future value of corporation stock are mere matters of opinion, and do not constitute actionable fraud, although they may be false. But there is a well-recognized exception to this general rule. Where the party making the false representations as to the value of the stock has, or assumes to have, special knowledge

> as to its value, and knows that the other party is ignorant of its value, and is relying upon his representations on the subject, the false representations will be regarded as of the statement of an existing fact and not mere opinion."

The *Restatement of Torts,* in section 525 thereof, states flatly:

> "One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or refrain from action in reliance thereof in a business transaction is liable to the other for the harm caused to him by his justifiable reliance upon the misrepresentation."

The Supreme Court of Arizona has consistently held that it will follow the Restatement of the Law unless a different rule has been pronounced by the Court in prior decisions or by legislative enactment. *Ingalls vs. Neidlinger,* 70 Ariz. 40, 216 P. 2nd 387.

B. Falsity of Representation.

The question of whether or not the above representations were true or false was a sharply disputed one at the trial. Contrary to the impression which is gotten from reading appellants' treatment of this point in their brief (pages 38-45), the issue before this Court is not whether there was sufficient testimony to support a finding that the representations were *true,* but whether there was sufficient testimony to support a finding that the representations were *false.* Appel-

lants quote at length the statements of two of their own witnesses, and seize upon two fragments of Cameron's testimony which, in appellee's opinion, prove nothing one way or the other.

Shepard said that the well was in good condition, that he had had a little trouble "which you could hardly class as trouble," but that it was all taken care of now. In contrast to this bland assurance, Gordon Cameron, who was a longtime friend of Shepard's and was the well driller who drilled and later deepened the well in question for Shepard, made the following candid statement:

> "Q: When you say you thought you could make a better well out of it, had there been trouble with the well?
>
> A: Well, it never was a good well from the day it was drilled." (Tr. 191).
>
> Q: Did you ever advise Mr. Shepard when he owned this well that he ought to drill a new well?
>
> A: No.
>
> Q: Did you ever tell him you thought he had a bad well?
>
> A: I didn't have to tell him. We all knew it was pumping that silt and sand. We talked several times about if we ever did drill a new one, how we would do it." (Tr. 200).

As can be seen from the following excerpts from the testimony at the trial and on deposition (all of which the trial court was entitled to believe or disbelieve, as it chose), Shepard gave three different ver-

sions of the history of the well: *The first* was given to Otto and Haas at the time of their conversation in November, 1954; *the second* was given on his deposition; and *the third* was brought out on cross-examination at the trial.

Shepard in November, 1954:

According to Otto, testifying at the trial, Shepard told them he had had a little trouble which "you really couldn't class as trouble" when the pump had been pulled by mistake, and also stated without going into detail that the well had been deepened in December, 1954. (Tr. 90-91).

Shepard on Deposition:

"Q: (After having elicited answers regarding difficulty that Cameron had had in getting down into the well when he went in to deepen it in December, 1954). Was this the only time you had any trouble with the well, as opposed to the machinery?

A: (By Mr. Shepard) The only trouble I had with the well. You couldn't classify that as trouble. He could have put a 9-inch bit in there as far as I was concerned. I just wanted the well deepened.

Q: There was no other occasion during the time between when you had the well drilled and the time you sold the land, that you had Gordon Cameron or any other well driller back?

A: No. The equipment was put back in. The crop was grown on the land, and a minute ago when

he mentioned that I used water from Gordon, it was ten days time, and they thought it was in the pump, and they pulled the pump, and it wasn't the pump, and they found it was the gas pressure on the engine, and it took about two turns with a screwdriver to put it back in shape.

Q. That was a different time than this deepening?

A: Yes.

Q: When was that, do you remember?

A: That was along in either July or August, I don't remember which.

Q: And you pulled the pump at that time?

A: Yes.

Q: And what again was the trouble?

A: The trouble was in the gas pressure on the engine. It was their mistake, but I paid for it.

Q: Who pulled the pump for you?

A: The State Tractor.

Q: It was during that time you used Gordon's water?

A: Yes; one of the times. One other time when we had some trouble—no; that was the time.

Q: So those were the only two times you had anything that might be called trouble either with the well or with the machinery?

A: Well, other than something minor with the engine—there was one time—or the pump. There was one time that . . . (the witness explained how he had had trouble with a nut on the engine)." (Tr. 59-61).

Thus, even after this lawsuit had been filed, Shepard in his testimony on deposition gave the distinct impression that the deepening had been uneventful, and that only troubles of the most minor and normal sort had been encountered in the history of the well. Only when he was confronted at the trial with the statements representing the enormous expenses he had incurred in attempting to repair the well did he admit to the true history of the well:

Shepard at the trial:

The pump had actually been pulled four times in less than two years, the bowls replaced twice, and over $12,000.00 expended in an effort to salvage the well. (Finding 9, Tr. 36); (Tr. 169-176).

Even after Shepard admitted these tremendous expenditures, he denied that the well's output had ever decreased.

Testimony of Shepard at the trial:

"Q: And there was no decrease in the output of the well that caused you to have it gone back into?

A: Absolutely not.

. . . . .

Q: Then it is your statement, Mr. Shepard, that on none of these occasions when the pump was pulled was there any decrease in the output of the water that caused you to pull it?

A: Naturally, there could have been some decrease. It might not have been noticeable to the eye." (Tr. 178).

In these assertions, Shepard was flatly contradicted by VERN A. TOWER, called by the plaintiffs, who was a sales engineer for the State Tractor and Equipment Company, and who had frequently had occasion to service the Shepard well.

Testimony of Vern A. Tower at the trial:

"Q: Calling your attention to the summer of 1953, Mr. Tower, did you have occasion to pull a pump for Mr. Shepard then?

A: Yes; we pulled a pump, I believe it was—I'm not too familiar remembering dates, but I would say it was during August.

Q: This is the summer of 1953 that would have been about three or four months after the well was drilled.

A: Yes; we did.

Q: And do you remember the reason for pulling the pump at that time?

A: The bowls were worn badly.

Q: And did Mr. Shepard make any statement to you to that effect before it was pulled?

A: No.

Q: Do you remember if the output of the well had gone down?

A: *Yes; it had dropped off some.* (emphasis added).

Q: And what did you do at that time, Mr. Tower, to the bowls?

A: Replaced them with a different design bowl with different material in the bowls.

Q: What was the purpose for those newly designed bowls?

A: Trying to overcome the wear from abrasive material that the well was producing.

Q: That would be sand?

A: Sand, silt and sand.

Q: Did you have occasion to pull that pump again the next summer, in 1954, Mr. Tower?

A: Yes; I believe it was in 1954, sometime in the middle of the summer.

Q: And do you remember the reason for pulling it at that time?

A: The bowls were worn again.

Q: *And the output of the well declined?*

A: *It had dropped off. That is the reason we were trying to bring it back into capacity.*

Q: *Substantially?*

A: *Quite a lot; yes.*" (Tr. 294-296) (emphasis added).

It was further developed in Mr. Tower's testimony that the last time the pump was pulled, in August, 1955 (four months before the conversation between Shepard, Otto, and Haas), Shepard, against the advice of State Tractor, had not replaced the worn bowls on the pump, but had simply had them re-machined.

Testimony of Vern Tower at the trial:

"Q: Mr. Tower, was that as satisfactory a remedy to the bowl condition as the replacement of the bowls would have been?

A: No. I would say that you could never in re-machining bowls build back the efficiency that the new bowls would have." (Tr. 296-297).

Finally, on the question of condition and history, there is the question of the proper conclusion to be drawn from Cameron's finding at the time he re-entered the well to deepen it in December, 1954. There is no doubt as to what actually happened, as appears from the testimony of Cameron, who testified with reference to the log sheet which had been kept under his supervision at the time of the drilling: The interior diameter of the casing was 16 inches; Cameron selected a 15 inch drill bit to sink into the existing well for the purpose of deepening it. At approximately 477 feet down, (the well prior to deepening had a depth of 1033 feet), the 15 inch bit hit something in the well and would not go further. The drillers removed the 15 inch bit and replaced it with a 12¼ inch bit, which was again sunk in the well. This smaller size bit failed to go past 458 feet. The smaller bit was in turn recoved, and a drill collar of 10 inches in diameter was substituted. This still smaller diameter hit something at 458 feet. At this point, the 10 inch drill collar was removed, and an impression block was inserted into the well and removed, and the 12¼ inch bit was reinserted. This bit "drilled through bad place," and went on to the bottom. (Tr. 193-195).

Shepard, as noted above, did not regard this as serious; Cameron testified that he had no opinion as to what the cause of the obstruction was. (Tr. 195). Appellee called an expert well driller, Kenneth G. Brown, and presented this hypothetical situation to him. He gave the following opinion:

Testimony of Mr. Brown at the trial:

"Q: And what is your opinion?

A: My opinion would be that the well had collapsed at that point, the 455 foot point, and that when the bit was put back in and was rotated to go through that, it would, my opinion would be they would drill the side off of the obstruction at that point.

Q: You mean a side off the casing?

A: Off the casing, yes.

Q: That would leave a break?

A: An opening. (Tr. 231).

Thereupon Mr. Brown was asked what might be expected to happen to a well in this condition, and his answer took some three pages (Tr. 231-234). A fair summary of his testimony is that large particles of gravel and earth may enter the well shaft through the hole in the casing at 477 feet, and may eventually fill up the well: therefore, instead of having 1033 foot expanse to draw water from, the well will have less than 500 feet.

The falsity of the representation as to the output of the well and the number of tubes that the well would run is supported by the testimony of Otto and of Brown. Otto testified that when he took possession of the land, he discovered that the well would produce only enough water to run 55 two inch tubes into the furrows, and that he estimated the output of the well at that time (after he realized there was a flange welded in it) to be between 1300-1400 gallons a minute.

This was in March, 1955, some five months after the conversation between Otto, Haas, and Shepard. The well was never used during this period (testimony of Shepard Tr. 247). The witness Brown, who is an expert on wells, testified that generally the capacity of a well will be as good or better at the commencement of one growing season as it was at the conclusion of the prior growing season. (Tr. 238).

The concrete, particular testimony summarized above cannot be brushed aside by appellants' broadside citation of testimony either having no bearing on the issue or tending to favor them. It should not require citation of authority to establish the proposition that this Court sits, not to retry the facts, but to determine whether there is any substantial evidence to support the findings made by the District Court as trier of fact.

C. Materiality.

Apparently even appellants do not have the temerity to assert that the representations in this case were not material. It is difficult to imagine a more important inquiry from the point of view of a purchaser of desert land in the Harquahala Valley of Arizona than that of the capacity of a well on the property.

D. Speaker's Knowledge of Its Falsity or Ignorance of Its Truth.

On the basis of the discussion under the head of "falsity" above, the most that can be said in Shepard's favor on the instant point is that he spoke in reckless ignorance of the truth of what he was saying. This is sufficient under Arizona law. *Rice vs. Tissaw,* 57 Ariz. 230, 112 P. 2nd 866; *L. C. James Motor Company vs. Wetmore,* 36 Ariz. 382, 286 P. 180; *Restatement, Torts, Section 526, Comment C.* But it is also clear that the trial court was justified in going further, as it did, in finding that Shepard spoke with knowledge of the falsity of the representation. Shepard's remarkable three-stage transition, from conversation in 1954 to trial in 1956, regarding the history of the well, is pointed out above; his failure to call responsible witnesses who were still in the area and would be familiar with the condition of his well prior to its sale; repeated conflict between his testimony on deposition and his testimony at the trial; his contradiction by other disinterested witnesses, as in the case of Tower; his very evasive response to the subpoena *duces tecum* served upon him, and ordering him to bring with him to the trial records pertaining to expenditures on the well and pump (he brought with him statements totaling approximately $1,000.00, and testified that he thought they were all the records pertaining to State Tractor and Equipment Company's services; thereupon, he was confronted with and forced to admit an additional four or five thousand dollars' worth of statements from

them which he had not produced); all of these factors more than justify the trial court in concluding that Shepard was a man who told the truth only when it suited his purposes, and that the afternoon of November 17, 1954, when he had the conversation with Haas and Otto, was a time at which it did not suit his purposes to tell the truth.

E. Intent that the Representation Should Be Acted Upon.

Appellants apparently misconstrued this requirement of law as the equivalent of proximate cause, since their argument under this heading goes to the question of whether or not Otto and Haas, on behalf of appellee, would have purchased the land regardless of whether Shepard had made any statement. Actually, what is involved under this requirements is not a question of proximate cause, but a question of intent on the part of the speaker: Did he intend that his representation should be acted upon? Certainly the Trial Court was justified in inferring such an intent on the part of Shepard at the time when by his own admission he knew Otto and Haas were interested in buying the land, he had quoted them a price on it, he knew that they were contemplating organizing a corporation to purchase it, and they made a trip to his ranch for the purpose of inspecting it and inquiring about the well. (Tr. 67).

F. The Hearer's Ignorance of Its Falsity.

An examination of appellants' contention in this regard in their brief discloses no separate argument on this point. (Tr. 51-52). The Trial Court found as follows:

> "Neither Otto nor Haas, nor any other agent of the plaintiff at anytime prior to the execution of the agreement described below knew of the falsity of these representations." (Finding XIII, Tr. 37).

G. His Reliance Upon Its Truth.

Certainly, on the issue of the *fact* of reliance, as opposed to the *right to rely,* it is not unusual for a potential purchaser to rely on the statement by a potential seller. The following testimony of Otto supports the finding of the Trial Court on this issue:

> "Q: Did you believe Mr. Shepard was telling the truth when he said the well put out 2200 gallons a minute?
>
> A: Yes.
>
> Q: And did you believe he was telling the truth when he said the well was in good condition?
>
> A: Yes.
>
> . . . . .
>
> Q: If you had known there had actually been considerably more trouble, would you have bought the land at that price?
>
> A: No." (Tr. 121-122).

Likewise, Henry Haas testified *on cross-examination:*

> Q: You weren't relying on Mr. Shepard, were you?
>
> A: When he talked to me and told me the well was in good shape, I certainly did. (Tr. 274).

Belying the fatuous suggestion of appellants that Otto and Haas relied upon all the neighbors, but not upon Shepard, is the following testimony of Haas on cross-examination:

> Q: Did Mr. Otto ever advise you he had talked to Woody about the water supply?
>
> A: He told me he had talked to people around the neighborhood about the condition of the place.
>
> Q: What did he tell you he had discovered about the water supply?
>
> A: He told me it sounded all right to him, but it seemed like he just couldn't get to the bottom of it.
>
> Q: Did he suspect there was something the matter with the water supply?
>
> A: Well, not exactly, but nobody would exactly commit himself. I don't know. (Tr. 277).

In short, the neighbors' statements, while not derogatory, had been sufficiently vague to make Otto want to put the questions regarding the well to the one man who would certainly know the answers: Elmer Shepard, the owner of the property.

Appellants contend that under these circumstances as a matter of law, Otto had no right to rely upon Shepard's representations, because Otto himself had an opportunity to inspect the property. In support of this position, they cite the two Arizona cases of *Law vs. Sidney,* 47 Ariz. 1, 53 P. 2nd 64, and *Springer vs. Bank of Douglas,* ..... Ariz. ....., 313 P. 2nd 399.

In *Law vs. Sidney,* the plaintiff was a woman of mature years, fully competent to transact business independently. The representation was made to her by the defendant that before she invested her money with him, a bond guaranteeing its return would be placed in a bank in the city where she resided. Defendant never actually represented to her that a bond actually had been so posted. The plaintiff gave her money to the defendant without ever making inquiry of the bank as to whether a bond had been posted. It was under these circumstances, feeling that the least the plaintiff could have done was to make inquiry at the bank, that the Supreme Court of Arizona used the language quoted on page 58 of appellants' brief. In *Springer vs. Bank of Douglas, supra,* the plaintiff was a customer of the bank, who counterclaimed against it for damages suffered as a result of fraudulent representations made by a bank officer. The claimed representations were a statement by the officer to plaintiff that one Davis, whom plaintiff had known for four months and done business with, would prove to be a satisfactory business partner. The Supreme Court of Arizona, in holding that the statement of the bank officer was a mere statement of opinion about which plaintiff had

an equally good knowledge, held that the counterclaim failed to state a claim for relief.

However, in the *Springer* case, after using the language quoted by appellants at page 58 of their brief, the Supreme Court of Arizona made the following statement which appellants have not seen fit to quote:

> "There is authority for founding fraud upon opinion statements, as where it is not open to both to make examination and inquiries or fair investigation is prevented or there is an inducement not to make investigation. The facts herein do not present any such situation." 313 P. 2nd at 402.

In *Perkins vs. Gross,* 26 Ariz. 219, 224 P. 620, the Supreme Court of Arizona did permit a party who had made an investigation of a house which she contemplated purchasing to recover for fraudulent representations as to the house. The Court there stated:

> "Such examination as was made was merely superficial and cursory, and did not assume to be full or complete. The defects were hidden and not readily discernible." 224 P. at 621.

The testimony in the instant case will support a finding of the following facts, anyone of which is sufficient under the above quoted language from the recent *Springer* case decided by the Supreme Court of Arizona: (i) It was not open to both parties to make examination and inquiries of the well, since Otto's testimony was to the effect that it would have cost $1500.00

to simply have the pump pulled out of the well. (ii) Fair investigation of the well and pump was prevented by the baffle which had been welded into the spout, and which according to Otto's testimony gave the appearance of a greater flow from the spout than was actually being produced. (iii) Shepard induced Otto not to make an investigation, in that Otto's inquiry about the muddy character of the water which he saw was brushed aside by Shepard with the statement that all wells in the area did that for the first few minutes. (Tr. 89; Tr. 267).

Appellee wishes to add a final word on the question of the right to rely in a fraud action. *Restatement, Torts,* Section 540, takes the flat position that in a business transaction, the recipient of a fraudulent misrepresentation is justified in relying on its truth, although he might have ascertained the falsity of the representation had he made an investigation. This statement has been approved in well considered cases, e.g., *Bishop vs. Strout Realty Agency,* 4th Cir. 182 Fed. 2nd 503, 505. According to the Restatement, only when it is clear that the decision to enter the transaction was not caused by the buyer's belief in the truth of the representation, but instead by the buyer's independent investigation alone, is the seller relieved of liability for misrepresentation as a matter of law. *Restatement of Torts,* Section 547. It is unnecessary to go this far to uphold the plaintiff's right to rely in the instant case, but these sections, unusually authoritative in Arizona, make it unthinkable that the Supreme

Court of Arizona, if faced with this case, would hold in accord with appellants' contentions.

H. Proximate Injury.

Appellee has endeavored to show that Otto and Haas did in fact rely upon the representations made to them by Shepard. If this be the case, it does not seem arguable that the damage to the well, and to the crop as a result of the well's failure, were not proximately caused by these representations. Appellants do not appear to contend otherwise. (see page 59 Appellants' brief).

DAMAGES

Appellee's discussion of the issue of damages will cover the following points: (a) The proper measure of damages in this action; (b) The correct application of the proper measure of damages to the facts of this case; (c) Appellants' claim of erroneous exclusion of testimony regarding damages.

(a) Measure of damages.

The Supreme Court of Arizona applies the so-called "Benefit of the Bargain" rule for ascertaining damages in fraud cases, and has indicated that it considers this rule to be the more liberal one. *Lutfy vs. R. D. Roper & Sons Motor Company,* 57 Ariz. 495, 115 P. 2nd 161, 165. Appellants do not appear to dispute this proposition (Appellants' brief, page 61), and there-

fore the dispute turns about how that rule should be applied to the facts of this case.

On principle, the benefit of the bargain rule is defined as the difference between the value which the property would have had had it been as represented, and the value which it in fact has. *Lutfy vs. R. D. Roper & Sons, supra; Curry vs. Windsor,* 22 Ariz. 108, 194 P. 958. Here, the plaintiffs' claim was that the fraudulent representations related to the well on the property, and represented it to be in good condition when in fact it was worthless. Logically, then, the benefit of the bargain rule should entitle them to recover the difference between the value of the land with a good well on it, and the value of the land with a worthless well on it. Perhaps it would be possible to prove these two values by a parade of expert witnesses, but surely an acceptable short-cut in this regard is to simply determine the cost, on this particular property, of drilling a well which would measure up to the representations made by the seller. Certainly the result in either case would be the same: Where the well is a necessary element to make the land worth anything, the value of the land without a well or with a worthless well will be less than the value of the land with a good well by precisely the amount of money which is required to install a good well on the land.

As might be expected, the authorities sustain the logic of this application. In *Nunn vs. Howard,* 216 Ky. 685, 288 SW 678, the Kentucky Court of Appeals held that where a polluted well was falsely represented to

give good water, the measure of damages was the cost of drilling a well which did give good water. Kentucky follows the same "Benefit of the Bargain" rule, as does Arizona, in fraud cases. *Gregory vs. Forester,* 228 Ky. 201, 14 SW 2nd 755. Likewise, *McCormick on Damages*, 1935, contains the following black-letter summary of the law, which supports this application:

> "Under the rule which measures the damage by the difference between actual value and value as represented, an alternative measure of recovery is the reasonable cost of placing the property received in the condition in which it was represented to be." *McCormick,* Sec. 122, P. 454.

These authorities give every reason to believe that the Supreme Court of Arizona, if confronted with this precise question, would reach the same result; and appellants have cited no authority whatever which would indicate the contrary.

Just as surely, where the injury to the cotton crop due to the lack of water is a proximate consequence of the failure of the well, appellee is entitled to its loss on the crop as well as for damages to the well. In a case indistinguishable from the present one, where land was sold with the representation that there was an adequate supply of water to irrigate it, the Supreme Court of Montana held that the buyer could recover as damages the first year's crop loss resulting from that misrepresentation. *Healy vs. Ginoff,* 69 Mont. 116, 220 Pac. 539.

Resatement of Torts, Section 549, reads as follows:

> "The measure of damages which the recipient of a fraudulent misrepresentation is entitled to recover from its maker as damages under the rule stated in Section 525 is the pecuniary loss which results from the falsity of the matter misrepresented, including . . . (b) pecuniary loss suffered otherwise as a consequence of the recipient's reliance upon the truth of the representation."

In the text following the quoted section, illustration 3, page 114, *Restatement, Torts,* Volume 3, is as follows:

> "3. A sells to B, f.o.b. Detroit, a machine which he fraudulently misrepresents to be of great value in the manufacture of B's product. B pays the freight of the machine to his factory and expends money in preparing for its installation. On the arrival of the machine the falsity of the representation is discovered and the machine is found to be useless for the purpose for which it was bought. B is entitled to recover, as special damages, the freight which he has paid and the expense which he has incurred in the installation of the machine, *as well as for harm done to his raw material by the machine before its uselessness was discovered."* (emphasis added).

Thus the Restatement (which, it bears repeating, is of peculiar force in Arizona where the particular point is undecided by the Supreme Court of the State, *Ingalls vs. Neidlinger, supra*), squarely supports the

allowance for damages to the crop under these circumstances.

(b) Application of these facts.

The Trial Court allowed the full amount spent for the new well as an element of damages. Appellants apparently do not attack these elements as such, but appellee takes the liberty of summarizing the contents of the three exhibits which evidence these expenses:

Plaintiffs' Exhibit No. 3: Cameron's bill for drilling well in the amount of	$17,541.73
Plaintiffs' Exhibit No. 4: Arizona Engine & Pump Company bill for removing and replacing the pump and machinery in the amount of	3,304.00
Plaintiffs' Exhibit No. 5: Joe Connelly's bill for furnishing of well rock in the amount of	1,760.67
	$22,606.40

Gordon Cameron, the man who drilled the new well, testified that he had done no more in the way of depth or casing than was necessary for a good well on the property (Tr. 199). No claim is or could be made that the other services were not necessary, and they are all proper items of damage.

As to the damage to the crop, the computation of a figure admittedly presents more difficulty than does the cost of the well. In a case decided September 30,

1957, and not yet reported in the Advance Sheets, the Supreme Court of Arizona made the following observation about damages for crop loss:

> "Damages of this character are not subject to exact proof. Many factors influence productive results. If the jury's computation is reasonably within the range of the evidence bearing thereon, the Court will not disturb it." *Pacific Guano Company vs. Ellis,* No. 6183, Supreme Court of Arizona.

Similarly, the Court of Appeals for the Eighth Circuit has laid down the following rule:

> "Where a crop is injured from time to time throughout its growing season until its maturity by sulphurous fumes and their products, but is not destroyed, so that it is cultivated throughout the season, harvested, and marketed, the damage to it may be lawfully measured under these rules by the difference between the value and maturity of the probable crop if there had been no injury, and the value of the actual crop at that time, less the expense of fitting for market that portion of the probable crop which was prevented from maturing by the injury." 236 F. 510, 513.
> *United States Smelting Co. vs. Sisam,* 8th Cir., 193 F. 293, (Headnote, Syllabus by the Court); approved *verbatim* in *American S &R Co. vs. Riverside Dairy,* 8th Cir., 236 F. 510, 513.

The *Riverside* case was quoted with approval by this Court in *United Verde Copper Company vs. Jor-*

dan, 9th Cir., 14 Fed. 2nd 299. Otto testified that he received in cash from the gin the amount of $16,975.21, for a crop of 116 bales from 105 acres. He also testified that as of June 1, given adequate water, his crop would have amounted to 2¼ bales per acre, or a total of 236 bales from the same acreage. Gordon Cameron, farming next-door to Otto, made 2½ bales per acre that year. Elmer Shepard, farming the identical land the previous year, made 1-7/10 bale to the acre. (Haas, on cross-examination, testified that Wood told him Shepard's farm "just wasn't run right." Tr. 277).

Without even considering the loss of staple length which resulted from the lack of water, and which plaintiff had by Exhibits 12 and 17 in the Trial Court correlated with the government loan price, the Trial Court could have concluded that Otto, an experienced cotton farmer, would have raised two bales of cotton to the acre, which would have given him an increased gross income from the crop in excess of $13,500.00 (two bales to the acre would mean a total crop of 210 bales, which, on the basis of the $16,975.21 that Otto received from his actual crop, would have given a total gross income in excess of $30,500.00).

Contrary to appellants' assertion on page 62 of their brief, appellee did make a showing in the Trial Court as to the expense of producing, harvesting, and marketing the probable crop which was not realized. Otto testified that he would have picked all the cotton himself, regardless how large the yield was (Tr. 120), and that no more money would have gone into cultiva-

tion if the crop had been larger. (Tr. 360). He further stated that the only added expense he could think of in connection with a larger crop would have been the cost of hauling additional cotton to the gin; this cost he estimated to be about ¼ cent a pound, and further estimated that 1400 pounds must be taken to the gin in order to get a bale of cotton. (Tr. 361). This would figure out to be $3.50 hauling charges for each bale of cotton, and, if two bales to the acre were to be realized, the additional hauling charges would be $3.50 x 94 bales, or around $330.00. Subtracting this figure from the added gross income (in excess of $13,500.00) which the added crop would have produced, the result is slightly more than $13,000.00.

In awarding appellee $12,500.00 damages for crop loss, it is quite obvious that the Trial Court resolved every doubt in favor of appellants and against appellee, and awarded to appellee the lowest possible computation of its loss. Certainly appellants may not complain of this.

Passing mention must be made of the contention (on page 62 of Appellants' brief) that appellee failed to prove it was necessary to drill a new well, citing Cameron's testimony at Tr., pages 211, 224-226. This argument verges upon the cynical; Cameron's testimony was that, although repair of the bowls would have made the well produce water, the bowls would have been constantly worn down by the sand coming into the well, and that since each time the bowls were replaced it cost $2,000.00, it was simply not economical-

ly feasible to attempt to merely replace the bowls. See, in addition to the pages cited by appellants, Tr. 227.

(c) Exclusion of Cameron's Testimony.

Appellants (at pages 62-63 of their brief) complained of a ruling of the Trial Court excluding an answer of the witness, Cameron, to a question propounded by appellants' counsel. This Court need not consider appellants' contention in this regard, since it was not contained in the specifications of error in the brief, *Thiel vs. Southern Pacific Company,* 9th Cir., 169 Fed. 2nd 30, 32, nor was it even mentioned in the statement of points to be relied upon. *Williams vs. Dodds,* 9th Cir., 163 Fed. 2nd 724, 725.

If this Court desires to consider the point on the merits, an examination of the coloquy contained in the record, (Tr. 217-218) indicates that Cameron was being asked his opinion as to the value of the land at the time appellee purchased it. Such a question and answer by itself, however, would be quite immaterial to the issues of this case; appellee was suing, not on the grounds that the value of the land had been misrepresented to him, or that he had been led to believe that the land was worth more or less than the $80,000.00 he paid for it, but rather on the ground that the condition of the well had been misrepresented to him. No

matter what answer Cameron would have given to this question, it could not have helped appellants. Even if he had been of the view that the land was worth $150,000.00 at the time appellee purchased it for $80,000.00, nonetheless, if the condition of the well on it had been misrepresented and appellee was damaged thereby, appellee was entitled to recover. It was the misrepresentation as to the condition of the well upon which appellee's claim was grounded, and he is entitled to be made whole for his reliance. *Curry vs. Windsor,* 22 Ariz. 108, 194 Pac. 958.

Finally, appellants made no offer of proof whatsoever as to what Cameron's answer would have been, nor did they include in their motion for new trial any affidavit or statement as to what the answer would have been. As stated at 4 C.J.S. 580 (Appeal in Error), Section 291 (b):

> "Subject to certain exceptions, a proper offer of the evidence excluded is usually necessary to save an objection to its exclusion for review."

This Court has so held, *Sacramento Suburban Fruit Lands Company vs. Miller,* 9th Cir., 36 Fed. 2nd 922, and so has the Supreme Court of Arizona, *Woodmen of the World Life Insurance Society vs. Velasquez,* 60 Ariz. 457, 139 Pac. 2nd 766. The rule applies to testimony elicited on cross-examination as well as to that elicited on direct examination. *State vs. Poolos,* 241 NC 382, 85 SE 2nd 342. In the absence of such an offer of proof, even if appellants' theory of admissibility is correct (which appellee denies), it is impossi-

ble for appellants to show that they have been harmed by the exclusion. Indeed, the only other evidence in the record touching on the question of Cameron's opinion as to the value of the land indicates that his opinion was based on an offer he made to Otto as president of appellee to purchase the property, and incidentally indicates that the Trial Court received the benefit of Cameron's opinion through appellants' cross-examination of Otto. (Tr. 367). Otto at this point testified that Cameron offered to buy the land for what appellee had in it after the new producing well had been brought in, but that before that Cameron had stated he would not pay the price of desert land for it. (Tr. 367).

In summary, the point is not properly raised in this Court; it was not properly preserved in the District Court; the action of the District Court in excluding the testimony was not erroneous; and in any event, appellants cannot show they were harmed by the exclusion. Any one of these reasons is sufficient for over-ruling appellants' charge of error in this regard.

CONCLUSION

Appellants have made an elaborate legal argument as to the standing of appellee to maintain this suit; appellee has endeavored to show that this argument is utterly without support in any of the authorities, and has nothing to commend it by way of principle. The remainder of appellants' brief is an attack on factual findings of the District Court; an attack conducted by means of excerpting from the testimony of witnesses called by the defendant or colorless passages of testimony from the appellee's witnesses, and ignoring the crucial testimony supporting the appellee's position upon which the District Court was entitled to base its findings. Appellants' efforts to press upon this Court the job of retrying the issue of facts that were already tried by the District Court falls far short of showing that the findings of the District Court were clearly erroneous. The case was fully and fairly tried by an experienced and able trial judge, and the result reached was eminently just. The judgment should be affirmed.

Respectfully submitted,

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